

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 27, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Caesar's Entertainment d/b/a
Bally's Park Place
Cases 4-CA-32794, 32808

177-8501
177-8520-0800
177-8520-4700
177-8560-1500
177-8560-5000
177-8580-8000
177-8580-8060
737-2850-9200

This case was submitted for advice as to whether certain floorpersons are supervisors within the meaning of Section 2(11) of the Act.

We conclude that the floorpersons at issue in this case are not statutory supervisors. Neither employee possesses any indicia of supervisory authority, such as the authority to effectively recommend that the Employer take personnel actions concerning other employees.

FACTS

Background Information:

Caesar's Entertainment (the Employer) operates Bally's Park Place, a casino in Atlantic City, N.J. (the casino). Teamsters Local 331 (the Union) has been engaged in a campaign to organize the Employer's dealers and floorpersons working at the casino. The Region estimates that the Employer employs at the casino approximately 240 floorpersons and more than 850 dealers.

In response to the organizing campaign, the Employer has, among other things, terminated one floorperson, William Totten, for his union activities and threatened to discharge another, Jack Hartely, if he were to continue his participation in the campaign.¹ The Employer admits the

¹ The Region did not seek advice on the merits of the discharge, or the alleged violations of Section 8(a)(1), and plans on issuing complaint if these individuals are statutory employees.

allegations, but asserts that its floorpersons are statutory supervisors because they effectively recommend that the Employer reward and promote other employees, responsibly direct employees, schedule employees, and discipline employees.

The Employer's Operation:

The Employer offers its customers opportunities to play a variety of games of chance, including blackjack, roulette, and craps. Each game requires a specific number of dealers: a blackjack game requires one dealer, but a craps game requires three dealers (two base and one stick person). Dealers work with floorpersons, such as Totten and Hartely, who are primarily responsible for watching games, assisting dealers in "optimizing" games,² adjusting minor dealer errors, and quickly resolving minor customer complaints. During their shifts, floorpersons spend most of their time at a computer at or between the gaming tables, but occasionally step away from the computer to address minor issues.³

Typically, one floorperson works with two or three dealers at a time, depending on the game. Eight to ten dealers and three or four floorpersons work within a specific area of the casino floor, known as a "pit;" one pit manager, with acknowledged 2(11) authority, supervises the employees in his pit. On a typical weekday, the Employer employs approximately 200 dealers and floorpersons per shift, who are assigned to 75 to 95 games in 13 to 15 pits.⁴ Pit managers report to a shift manager, who reports to the casino manager. Dealers and floorpersons do not regularly work with the same group of employees or pit managers as the needs of the casino and employees' availability require regular staff rotation.

² "Optimizing" games means ensuring that games are played as fast as the dealers and players can handle.

³ Two discrete groups of floorpersons handle dealer scheduling and new dealer auditions and, therefore, spend considerably less time, if any, in the pits. Neither Totten nor Hartely perform scheduling or new employee auditions, and so the supervisory status of employees in those two groups is not at issue in this case.

⁴ While the Employer employs significantly more dealers and floorpersons on weekends, the dealers to floorpersons and floorpersons to pit managers ratios remain the same.

Floorpersons work two hours at a time, taking half-hour breaks. Dealers either work one hour or 40 minutes at a time, then take a 20-minute break. Dealers' wages range from about minimum wage to \$8.50 per hour, plus tips (tips are pooled and average \$13.00 per hour, per employee); floorpersons earn \$210 per shift; and pit managers earn \$250 per shift.⁵

Dealers, floorpersons, and pit managers share the same vacation and other benefits. Dealers wear uniforms; floorpersons and pit managers wear business suits. Dealers take their breaks in the cafeteria, but floorpersons may take their breaks in either the cafeteria or the supervisors' lounge.⁶ Floorpersons do not attend regular management meetings, but pit managers and higher-level managers attend monthly management meetings.

Floorpersons' Duties:

Floorpersons and dealers are responsible for opening and closing games. The processes for opening and closing games are tightly regulated and the Employer maintains detailed written instructions as to how employees should handle each matter. A pit manager controls the opening process by bringing to each game table a locked container with the inventory necessary for that particular game. The pit manager unlocks and opens the container for the dealer to count in the presence of the floorperson. After they verify the inventory, the floorperson and dealer(s) each sign an inventory control slip. When closing a game, the pit manager returns with his or her own inventory control slip, confirms the floorperson and dealer's inventory count, and then locks the box.⁷

Once the dealers and floorpersons open their games, they are expected to run them as quickly as possible, thus maximizing the casino's revenue. Occasionally dealers will fall behind or make errors, due to their relative inexperience or inferior skills. Floorpersons will

⁵ Floorpersons and pit managers do not receive tips.

⁶ Dual rates (employees who work as dealers and floorpersons) and pit managers may also use the supervisors' lounge.

⁷ In the event of an emergency, floorpersons are to follow specific instructions for disrupting games, securing funds, and closing games. Regardless of the game or emergency situation, however, floorpersons and dealers must remain at their tables until a pit manager secures their tables.

optimize a game by working with dealers to keep the game moving by, for example, encouraging them to pick up the pace or by correcting minor errors which the dealers otherwise would have to take time to correct. Floorpersons may have to call the pit manager in situations where the dealer's pace or excessive mistakes impede the flow of a game or put the casino at risk, such as in "high-action situations" (i.e., players have wagered large sums in a particular game and there is a lot of money at stake).⁸ The pit manager will then observe the dealer and he alone will determine whether the dealer should be moved to another table, or whether the floorperson must continue to work with the dealer. Floorpersons do not have the authority to remove or reassign any dealer.

In addition to instructing dealers to optimize each game, the Employer requires its dealers to conduct themselves in a very specific manner when running games. The Employer issues to each dealer manuals that describe the many rules for each of the various games, and trains dealers to keep their hands, bodies, and eyes fixed in certain positions that will best protect the integrity of the games. Floorpersons watch dealers to ensure that they are following the Employer's procedures and the rules for the particular game. Floorpersons, who receive a separate floorpersons' manual describing the Employer's policy but little additional formal training, are to contact their pit manager if they observe any dealer failing to adhere to the Employer's procedures.

Dealers have the authority to conduct transactions under \$100; floorpersons must approve transactions over \$100.⁹ Dealers must report all errors to the floorperson and may not correct them on their own. Floorpersons may correct mistakes under \$100, but must contact the pit manager if a dealer's mistake exceeds \$100. There is no evidence that such minor mistakes under \$100 have ever served as the basis for discipline.

Floorpersons also order chips for games when they run low; such orders are known as "fills." Security employees bring the fills to the appropriate pit stand, where the pit manager will sign off on them. After the pit manager

⁸ There is no evidence that floorpersons must contact pit managers if dealers make a certain number of minor errors within a shift.

⁹ Each game and table has minimum and maximum betting amounts.

approves a fill, he brings it to the game table where the dealer and floorperson will count it together.

Floorpersons occasionally fill out and submit to pit managers Suspicious Activity Reports (SAR's) when they observe players engaging in suspicious activity. Floorpersons must contact their pit manager if they observe dealers engaging in suspicious activity. The pit manager will observe the dealer and may, at his sole discretion, order video surveillance of the dealer or take some other action.

From time to time, dealers may ask for an "audition" to qualify as a dealer on an additional game. A pit manager will schedule a 10 - 15 minute live action opportunity to run a particular game. Pit managers advise dealers of the audition shortly beforehand, and the auditioning dealer "taps out," or relieves, the dealer on the game, who then steps aside to watch the audition. The floorperson runs the games as usual.¹⁰

Pit managers watch most or all of each audition. Occasionally, the pit manager will move the auditioning dealer to a table with more action. If the pit manager does not observe the entire audition, or does not have a particularly strong background in the game at issue, he might ask floorpersons and dealers their opinion of the auditioning dealer.¹¹ Finally, the pit manager will take the dealer to the pit stand, critique the dealer's work, and tell the dealer whether he passed or failed the audition.¹²

Two to five times a year, pit managers instruct floorpersons to observe dealers for approximately five to ten minutes, then rank the dealers in five discrete categories: mechanical dealing skills, associate and supervisor relations, customer relations, game protection

¹⁰ Floorpersons continue to take scheduled breaks during auditions, and thus they may not observe the entire audition when they are "tapped out" for a break.

¹¹ There is no evidence regarding how many auditions pit managers conduct each year, or how often pit managers solicit dealers' and floorpersons' opinions. Floorpersons contacted by the Regions all stated that they observe one or two auditions a year, and that pit managers asked for their opinion of a dealer from 15 - 50 percent of the time.

¹² Only pit managers have the authority to determine whether a dealer passes or fails an audition.

and procedures, and appearance. Floorpersons are required to use an Employer-generated form, and must restrict their ratings to the choices on the form (poor, below average, average, above average, excellent). Floorpersons need not know the observed employee, as pit managers regularly direct floorpersons to observe and evaluate dealers with whom they have not previously worked.

After floorpersons complete their observation, they rank the dealers' performance by making a small pencil mark in the corresponding rating boxes, and submit it to the pit manager along with a one or two sentence draft narrative that is consistent with the overall observation. The pit manager then reviews the form and draft narrative.

After reviewing the floorperson's initial rating, pit managers usually direct the floorperson to change the rating in one or more elements and rewrite the narrative.¹³ The pit manager returns the adjusted evaluation and redrafted narrative to the floorperson with directions to "ink it," that is, to complete the form in ink, consistent with the pit manager's changes. There is no evidence that pit managers explain to floorpersons their reasons for making any changes, nor is there evidence that pit managers entertain any discussion regarding changes.

The Employer assigns each aspect of the evaluation a value, as defined by the Employer's "Dealer Evaluation Scoring Chart." Once "inked" and signed by a floorperson, the pit manager-approved evaluation is scored and that score will determine the dealer's wage increase, not to exceed an Employer-mandated maximum increase.¹⁴

Employee discipline is handled by pit managers or above. There is no evidence that the Employer regularly disciplines floorpersons for dealers' mistakes. Rather, the Employer disciplines floorpersons and dealers separately for their discrete roles in a particular incident. For instance, a floorperson has been disciplined for his failure

¹³ According to various floorpersons, pit managers direct them to change their ratings between 25 and 100 percent of the time, and almost always redraft the proposed narrative to make it more "politically correct," or to comport with directives from the Employer's legal department.

¹⁴ Each floorperson interviewed in this case stated that they believed the evaluations played a role in employees' wage increases but did not know how increases were calculated, or how their ratings of employees might affect such calculations.

to catch a dealer's accounting error, but was not disciplined for the dealer's error itself.¹⁵

ACTION

We conclude that floorpersons Totten and Hartely are not statutory supervisors.¹⁶ There is no evidence that floorpersons exercise independent judgment sufficient to meet the statutory threshold as to any 2(11) criterion; responsibly direct other employees; or effectively recommend that the Employer take any personnel action concerning other employees. The evidence also establishes that Totten and Hartely do not hire, schedule, or discipline employees.

A. Totten And Hartely Generally Lack The Independent Judgment Necessary To Establish Supervisory Status

Section 2(11) of the Act involves a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."¹⁷

The Supreme Court in Kentucky River recognized that the statutory term "independent judgment" is ambiguous with

¹⁵ The Employer submitted documentary examples of discipline issued to pit managers, floorpersons, and dealers for their roles in a dealer's mistake, as proof that floorpersons are held responsible for dealers' errors. None of these examples clearly show that any floorperson has been disciplined for a dealer's error rather than his failure to catch the error. The Employer refused to provide additional evidence regarding the alleged discipline.

¹⁶ In this context, our conclusion is limited to the floorpersons at issue in this case. A determination as to whether all floorpersons employed by the Employer at the casino, including schedulers and auditioners, are employees within the meaning of Section 2(3) of the Act is appropriately left to the Regional Director and the Board, in the event the Union or another labor organization files a representation petition.

¹⁷ Kentucky River Community Care v. NLRB, 532 U.S. 706, 713 (2001), citing NLRB v. Health Care & Retirement Corp. of America (HCR), 511 U.S. 571, 573-574 (1994).

respect to the degree of discretion required for supervisory status.¹⁸ "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act."¹⁹ Therefore, it is within the Board's discretion to determine, within reason, what scope or degree of independent judgment meets the statutory threshold.²⁰ However, the Court rejected the Board's interpretation that employees do not use independent judgment when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.²¹ Nonetheless, the Court upheld the Board's rule that the burden of proving supervisory status rests with the party asserting it.²²

In determining whether judgment is "routine" because it is limited and constrained by the directions of higher officials who have not delegated the power to make independent judgments, the Court cited with approval Chevron Shipping Co.²³ In Chevron, the Board determined that, although second and third mates acting as watch officers were responsible for "directing the unlicensed employees, assigning tasks, and ensuring the safety of the ship and its cargo. . . their exercise of independent judgment was circumscribed by the master's standing orders, and the Operating Regulations, which required watch officers to contact a superior when anything unusual occurred or when problems occurred."²⁴ Crewmembers' duties were delineated in great detail in the employer's regulations and officers, and crewmembers generally knew what was expected of them and how to accomplish such tasks. During non-routine situations, watch officers would be in

¹⁸ Id. at 713; see also HCR, above, at 579.

¹⁹ Kentucky River, above, at 713, citing Weyerhaeuser Timber Co., 85 NLRB 1170, 1173 (1949).

²⁰ Kentucky River, above, at 713-714. See also Dynamic Science, Inc., 334 NLRB 391, 391 (2001).

²¹ Kentucky River, above, at 714-715, 720.

²² Id. at 710.

²³ Id. at 714, citing Chevron, 317 NLRB 379, 381 (1995).

²⁴ Chevron, 317 NLRB at 381.

constant contact with superior officers.²⁵ Absent any information from the employer regarding how often watch officers actually broke with routine, how much officers could have deviated from standing orders, or how much discretion was actually involved in telling crewmembers to perform their assigned functions, the Board found the second and third mates to be employees rather than supervisors.

Similarly, in Dynamic Science, above, a post-Kentucky River case, the Board concluded that "test leaders" running evaluations of military weaponry were employees rather than supervisors. There, the "test leaders' role in directing employees" was "extremely limited and circumscribed by detailed orders and regulations issued by the employer and other standard operating procedures."²⁶ Thus, the degree of independent judgment exercised by test leaders "fell below the threshold required to establish statutory supervisory authority."²⁷

Floorpersons' duties, like the duties of the employees in Chevron and Dynamic Science, are "routine" and tightly constrained by the Employer's rules and policies. As set forth in detail below, their ability to responsibly direct, evaluate, and audition dealers is greatly circumscribed by the Employer. Accordingly, floorpersons do not exercise "independent judgment" sufficient to implicate Section 2(11).

B. Floorpersons Do Not Responsibly Direct Other Employees By Using Independent Judgment

An individual responsibly directs employees with independent judgment within the meaning of Section 2(11) only if that employee (1) has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge," (2) is held accountable for the work of others, and (3) exercises significant discretion and judgment in directing his or her work unit. In every case, employees' actual authority and freedom to exercise discretion are dispositive of their supervisory status. Thus, employees are not supervisors where established procedures and rules limit their discretion to

²⁵ Id. at 381-382, citing Quadrex Environmental Co., 308 NLRB 101 (1992) and Somerset Welding & Steel, 291 NLRB 913 (1988).

²⁶ Dynamic Science, above, 334 NLRB at 391.

²⁷ Id.

make decisions; limits the employees' direction of others' work to routine and repetitive tasks; or limits their authority to merely conveying superiors' directions.²⁸

The evidence here establishes that neither Totten nor Hartley responsibly direct other employees using independent judgment: neither has been "in charge" of their work unit; neither has been held accountable for the work of others; and neither has exercised significant discretion or judgment when working with other employees.

It is clear that neither Totten nor Hartley are "in charge" of their work unit because the Employer has not delegated to them the authority to ensure that dealers achieve the Employer's objectives. On the contrary, the Employer has apparently vested almost total control over work in the pits in the pit managers. As the Employer's manuals dictate, and as the employees' experiences confirm, floorpersons have no authority to handle anything other than the most routine matters (e.g., minor dealer errors, slow play, lack of dealers using procedures). Indeed, as the floorpersons' manual provides, floorpersons must contact pit managers to handle "all employee situations . . . no matter how minor . . . they may be." Such constrained authority is insufficient to establish that Totten or Hartely are statutory supervisors.²⁹

There is also insufficient evidence that Totten, Hartely, or other floorpersons are held responsible for the work of others. Floorpersons must refer significant dealer mistakes to pit managers and, presumably, pit managers might observe dealers' mistakes without prior warnings or notice from a floorperson. There is no evidence, however, that the Employer holds floorpersons accountable for dealers' mistakes. Rather, the Employer's evidence establishes that dealers are disciplined for their errors, and floorpersons are disciplined for their own, albeit related, errors when appropriate. The most common incidents involve accounting errors where, for example, a dealer might significantly understate his table's receipts. If the floorperson fails to catch the error, the dealer might be disciplined for his accounting error, and the floorperson might be disciplined for his failure to spot and correct it. Stated differently, as with minor mistakes

²⁸ See the General Counsel's brief to the Board regarding Kentucky River issues in Oakwood Healthcare, Inc., Case 7-CA-22141, et al., pp. 5-6, filed September 18, 2003.

²⁹ See, Chevron Shipping Co., above, 317 NLRB at 381; Dynamic Science, above, 334 NLRB at 391.

at the table during games (errors under \$100), accounting errors by the dealer do not result in discipline for the floorperson.

We note, however, that even if the Employer were to provide evidence that floorpersons are regularly held accountable for the work of others, that alone would not establish the floorpersons' supervisory authority. Such evidence is not dispositive of whether floorpersons exercise independent judgment or whether they are "in charge" of dealers.³⁰

Finally, the evidence clearly establishes that floorpersons do not exercise significant discretion and judgment in directing dealers. Individuals are not supervisors merely because their employer has charged them with keeping production moving,³¹ or keeping employees busy on assignments given to them by others.³² More experienced employees are not supervisors merely because they direct less experienced employees,³³ or because they direct routine, repetitive tasks, absent some evidence that they exercise statutory independent judgment.³⁴ Here, the Employer's evidence shows that every aspect of the floorpersons' and dealers' duties are tightly constrained by the rules of the various games and the Employer's rules and policies. Floorpersons and dealers must adhere to the

³⁰ See the General Counsel's brief in Oakwood Healthcare, Inc., above at footnote 27, pp. 6, 22-25. See also, Third Coast Emergency Physicians, P.A., 330 NLRB 756, 759 (2000) (while emergency physicians were responsible by law for making sure midlevel providers follow hospital protocols and standing orders, such mandated accountability did not establish supervisor status where physicians did not otherwise responsibility direct midlevel providers, nor did they exercise independent judgment regarding any employment issues). Cf. American Commercial Barge Line Co., 337 NLRB 1070, 1071 (2002) (if a crew member on the towboat did something wrong during the pilot's watch, the pilot was held responsible).

³¹ Endicott Johnson Corp., 67 NLRB 1342, 1347 (1946), cited with approval in S. Rep. No. 105 (1947), 1 Leg. Hist. 410.

³² Precision Fabricators, Inc. v. NLRB, 204 F.2d 567, 568-569 (2d Cir. 1953).

³³ E.C. Waste, Inc., 339 NLRB No. 39 (2003), enfd. 359 F.3d 36 (1st Cir. 2004).

³⁴ Ironton Publications, Inc., 321 NLRB 1048, 1060 (1996).

Employer's strict standards, and floorpersons are to contact their pit managers to handle everything but the most routine matters. Indeed, the Employer's manuals even dictate specifically how floorpersons should respond in emergency situations, e.g., disrupt the games, return all wagers, and wait for the pit manager to secure the tables. A floorperson's limited discretion to resolve a dealer's minor errors without discipline in order to keep a game moving is insufficient to establish that floorpersons possess any supervisory authority.

C. Totten and Hartely's Roles In Evaluations Do Not Establish That They Possess Supervisory Authority

The authority to "evaluate" is not one of the indicia of supervisory status set out in Section 2(11) of the Act.³⁵ Nevertheless, the Board has consistently held that employees are supervisors if they evaluate other employees, and those evaluations are directly related to such personnel actions as merit raises.³⁶ An employee's ability to evaluate other employees is not evidence of supervisory authority, however, if the employees at issue do not exercise sufficient independent judgment, or the evaluations do not constitute effective recommendations for personnel actions.³⁷ The Board has found employees to have made effective recommendations only where the employer accorded sufficient weight to their recommendations,³⁸ or their evaluations of other employees led directly, by automatic wage linkage or by recommendations that are not changed by reviewing managers, to personnel actions affecting the evaluated employees.³⁹

³⁵ Williamette Industries, Inc., 336 NLRB 743, 743 (2001), citing Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999).

³⁶ Williamette Industries, Inc., 336 NLRB at 743, citations omitted.

³⁷ Bayou Manor Health Center, 311 NLRB 955, 955 (1993).

³⁸ See, e.g., Chicago Metallic Corp., 273 NLRB 1677, 1692-1693 (1985).

³⁹ See, e.g., ITT Lighting Fixtures, 265 NLRB 1480, 1481 (1982) (authority to effectively recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed").

1. Floorpersons Do Not Exercise Sufficient Independent Judgment When Evaluating Employees

Floorpersons' evaluations of other employees do not involve independent judgment of a supervisorial nature but are more akin to senior, more experienced employees passing judgment on the work of less experienced employees performing routine tasks. Floorpersons are limited to rating dealers' proficiency at routine tasks and compliance with the Employer's rules and policies. Indeed, dealers' duties are so regimented and routine that floorpersons do not even need to know, or to have worked with the dealer whom they are evaluating. Thus, floorpersons' limited evaluations of previously unknown dealers do not reflect the degree of independent judgment necessary to establish supervisory status.⁴⁰

2. There Is No Evidence That The Employer Gives Sufficient Weight To Floorpersons' Evaluation Of Other Employees

The Employer also has not proffered any evidence regarding what weight, if any, it gives to floorpersons' initial ratings for annual evaluations, and such evidence is necessary to establish an employee's supervisory status.⁴¹ The Board has found no such weight where employee evaluations are independently considered by supervisors,⁴²

⁴⁰ Northern Montana Health Care Center, 324 NLRB 752, 755 (1997), enfd. in rel. part 178 F.3d 1089 (9th Cir. 1999) part (LPN charge nurses evaluated nurse aides, using an employer-generated form, on how well the aides performed routine tasks; such a limited "evaluation" function did not require the exercise of independent judgment, only the exercise of routine or clerical functions); and Providence Hospital, 320 NLRB 717, 724 (1996) (evaluations were primarily geared toward determining what limited functions employees were capable of performing). Compare with Iron Mountain Forge Corp., 278 NLRB 255, 259 (1986) (leadman used independent judgment when he rated employees from unacceptable to outstanding, with 3 intermediate ratings, on each of the 10 listed job criteria; ratings were of permanently assigned subordinates, called for largely subjective judgment by the leadman, and were routinely approved by management).

⁴¹ See Chicago Metallic Corp., above, 273 NLRB at 1692-1693.

⁴² Quality Chemical, Inc., 324 NLRB 328, 330 (1997); Ahrens Aircraft, Inc., 259 NLRB 839, 843 (1981); Pennsylvania Power & Light Co., 122 NLRB 293, 295 (1958).

or where supervisors have complete discretion to agree or disagree with the evaluating employee, reduce the numerical score, or enter narrative comments that reveal a personal knowledge of the evaluated employee's work habits.⁴³

Here, floorpersons submit tentative recommendations to pit managers in pencil, which are recorded and tallied to determine a dealer's wage increase only after a pit manager reviews and approves it. Pit managers regularly change the floorpersons' numerical score and proposed written evaluations without any notice, explanation, or consultation with the floorperson. On other occasions, pit managers instruct the floorperson specifically how to change which ratings and on appropriate narrative language. Thus, we conclude that floorpersons do not effectively recommend that the Employer reward employees for outstanding performance, or limit the annual wage increase for poor performers at floorpersons' recommendations.

D. Floorpersons Do Not Effectively Recommend
Promotions Through Their Role In Dealer Auditions

The evidence is also insufficient to establish that floorpersons promote or effectively recommend the promotion of other employees by virtue of their limited role in current dealers' auditions. Pit managers run the auditions, and determine which dealers will audition, as well as when and where they will audition. Indeed, only the pit manager is required to be present, as floorpersons are often tapped out during auditions. Floorpersons merely watch the games as usual. Pit managers might ask floorpersons for their opinion of auditioning dealers, but they also ask nonsupervisory dealers in the area for their opinions as well. Thus, a floorperson's judgment of the merits of an auditioning employee, like a dealer's opinion of the same employee, is insufficient to establish supervisory status.⁴⁴ Regardless, as with annual evaluations, there is no evidence regarding what, if any, weight the Employer gives to a floorperson's opinion of an auditioning dealer.

⁴³ See Ahrens Aircraft, 259 NLRB at 843; Quality Chemical, 324 NLRB at 330-331. See also Chicago Metallic, above, 273 NLRB at 1692-1693 (although employee had "input" into evaluation, management could reject input without explanation, thereby denying input any decisive effect).

⁴⁴ See, e.g., Mount Airy Psychiatric Center, 253 NLRB 1003, 1008 (1981) (charge nurses were not supervisors where the employer sought hiring and firing input from all staff nurses).

E. Totten And Hartely Were Not Involved In Hiring Or Scheduling

The Employer's evidence does not support its argument that Totten or Hartely have any role in the hiring or scheduling of employees. Rather, the Employer's evidence establishes that two small, discrete groups of floorpersons is assigned those duties. Neither Totten nor Hartely is among the ten floorpersons that the Employer identified as responsible for scheduling dealers and floorpersons, nor are they among the three floorpersons that the Employer identified as applicant auditioners. While Totten may have performed some administrative work in the scheduling office several years ago, the Employer does not assert, nor is there evidence to suggest, that Totten performed any scheduling-related tasks when the Employer terminated him for his Union activities.

F. Floorpersons Have No Role In Employee Discipline

"It is well established that the mere exercise of a reporting function that does not automatically lead to discipline or adverse action against an employee does not establish disciplinary authority."⁴⁵ Thus the Board will not find that employees possess supervisory authority to discipline if they merely present the employer with evidence of poor performance or violations of the employer's rules or policies, without recommending disciplinary action.⁴⁶

Here, the floorpersons' role in the Employer's disciplinary process is purely reportorial. Totten, Hartley, and other floorpersons testified, consistent with the Employer's written policies, that they are required to contact a pit manager if a dealer engages in conduct that might warrant discipline. Floorpersons merely advise the pit manager of the perceived problem, which the pit manager evaluates and handles, if necessary.⁴⁷ There is no evidence

⁴⁵ Lincoln Park Nursing Home, 318 NLRB 1160, 1162 (1995), citing Ohio Masonic Home, 295 NLRB 390, 393 (1989); Lakeview Health Center, 308 NLRB 75, 78-79 (1992); and Passavant Health Center, 284 NLRB 887, 891 (1987).

⁴⁶ See, e.g., Williamette Industries, above, 336 NLRB at 744; Passavant Health Center, above, 284 NLRB at 889; Foote's Dixie Dandy, Inc., 223 NLRB 1363, 1364 (1976); Chevron Shipping Co., 317 NLRB at 381.

⁴⁷ For example, pit managers often tell floorpersons that they will "watch" a dealer or "take care of" a situation,

that pit managers solicited, or that floorpersons offered, any recommendations that the pit manager take specific action or impose a particular punishment.

[FOIA Exemption 5

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G. Secondary Indicia, Standing alone, Are Insufficient To Establish Supervisory Authority

Secondary indicia of supervisory status are not set forth in the Act, but may provide insight into the existence of supervisory status. The Board has held, however, that secondary indicia of supervisory status are not dispositive "in the absence of evidence indicating the existence of any one of the primary indicia of such status."⁴⁸ Thus, while there is evidence that floorpersons are paid more than dealers, wear business attire rather than a uniform that dealers wear, and enjoy some benefits that dealers do not, there is no evidence that floorpersons possess any of the 12 statutory indicia of supervisory authority.

In sum, neither Totten nor Hartely are statutory supervisors. These floorpersons do not possess any indicia of supervisory authority, and their judgment and authority to direct or evaluate other employees are constrained by

but they just as often tell floorpersons to accept the dealer's shortcomings and keep the games running.

⁴⁸ See, e.g., Central Plumbing Specialties, Inc., 337 NLRB 973, 975 (2002), citing Billows Electric Supply of Northfield, 311 NLRB 878 fn. 2 (1993).

the Employer's rules and policies. Accordingly, the Region may issue an 8(a)(3) and (1) complaint, absent settlement.

B.J.K.